No. 7718

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OSCAR S. LUND,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Appellee

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SUBJECT INDEX

CITATIONS AND AUTHORITIES

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Statement of the Case

The appellant stands convicted and sentenced on two counts charging violation of the provisions of Section 76, Title 18, *U.S.C.A.* (*Crim. Code,* Sec. 32.) The section provides:

> "*Falsely pretending to be United States Officer.* Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper,

document, or other valuable thing, shall be fined not more than $1000, or imprisoned not more than three years, or both."

The reply brief of appellee will treat separately the principal grounds urged by the appellant in support of his appeal.

I.

Reply to Appellant's Argument That the Court Erred in the Taking of Testimony Out of the Presence of the Jury and in Not Recalling the Jury to Hear This Testimony.

(A) No Testimony Was Taken

(1) An examination of the transcript (Tr. p. 18) discloses the fact that the court received a communication that the witness Davis desired to make a *statement.*

It is true that word of the witness' desire to make such a statement came to the court after the arguments had been partially completed, before the case was given to the jury. We take issue with the appellant's contention that the statement which followed, as recorded in the record (Tr. pp. 19-23) was in any sense testimony, but on the contrary, distinctly shows was a statement not made under oath. This is borne out by the following quotations from the transcript. After Mr. Davis had made an extended statement (Tr. pp. 19-21), the following interruption was made by Mr. Irwin representing the Government:

> "I wonder if the witness Davis would care to be put under oath while making this statement?"

to which the court replied:

"No, let him continue making the statement."

(2) The purpose of the statement by Davis was to avoid prosecution for perjury.

Examination of the transcript shows that at the conclusion of Davis' statement, the said Davis indicated that his purpose in addressing the court was not to seek to change his testimony but an effort to escape the consequences of his testimony. It was, in effect, a plea for the court's mercy. (Tr. p. 22.)

> "The Court: Does that conclude the statement you wish to make?
>
> Mr. Davis: Well, I am told I am held here to—to be held under perjury. I don't understand this perjury. I have never had that experience. This is my first time on the witness stand in my life, and I don't understand how it is that I am held on perjury after trying to be honest with every one concerned. And I wish to have that made clear to me.
>
> If I have done anything that isn't in accordance with the Court, and being dishonest, I wish to try and remedy it. I have no desire to do so."

Then in response to a question by the court, Mr. Irwin, representing the Government, stated (Tr. p. 23):

> "It has already been filed. I understand that when the witness leaves the courtroom he will be served with a warrant in connection with the existing complaint which has been presented to the Grand Jury, but will probably be returned, and in the meanwhile a Commissioner's complaint has been sworn to, and

bond has been fixed, so I think at this time I can move your Honor to rescind the order of detention of that witness as a material witness."

(B) No Motion Was Made to Recall the Jury

Assuming but in no way conceding that the statement of the witness Davis, before alluded to, was testimony, no motion was made by defendant's counsel to recall the jury. Such a motion was made in the case of *Elkins v. Commonwealth*, 53 S. W. (2d) 358 (cited by appellant), who asked for the recall of the jury in order that further testimony might be presented showing the financial interest of the chief prosecuting witness. The testimony there sought to be introduced were statements by the prosecuting witness in the hall outside the courtroom, after the jury had retired, to the effect that he had been compensated for his testimony. That motion was denied and the Kentucky court reversed it on that ground.

Accepting the statement of appellant that the law in this state is that a trial is not concluded until the verdict of the jury is reached and again assuming that the witness Davis' statement was testimony, defendant's remedy was by motion to recall the jury and not a motion for a mistrial. The record discloses that the only motion urged by defendant's counsel at the conclusion of Davis' statement was a motion for a mistrial. (Tr. pp. 23-34.)

II.

Reply to Appellant's Argument That the Court Was Without Jurisdiction to Impose Any Sentence Upon the Second Count.

(A) It is contended that the court erred in denying defense motion for arrest of judgment.

> "Comes now the above named defendant and moves the Court in arrest of the judgment this date pronounced in the above entitled cause, upon the ground and for the reason that said Court was without jurisdiction or power to sentence said defendant to any term in excess of three (3) years because the evidence conclusively shows but one offense was committed; that the offense charged in each count of the indictment is identical; and that there was been an attempt made to carve two offenses out of the same state of facts.
>
> DATED: July 10th, 1934.
>
> AMES PETERSON
> Attorney for Defendant."

Said motion was thereafter denied by the court and exception allowed to the defendant. (Tr. p. 25.)

1. Motion in arrest of judgment reaches only errors on the face of the record which would render the judgment erroneous if entered. Evidence is no part of the record for this purpose (Vol. 5, Cyc. of Fed. Proc., Sec. 2432, p. 759). In *Demolli v. United States,* 8th Circuit case, decided March, 1906, reported in 144 Fed. 363, at page 366, the above-mentioned proposition of law is supported, to-wit: the judgment can be arrested only for matter appearing on the face of the record and

the evidence is no part of the record for this purpose. The same proposition is supported in 251 Fed. 932 and 222 Fed. 444. Both of these cases are district court decisions.

2. It is urged that no defects or errors appear on the face of the record for the indictment charges two distinct offenses, both under Section 32, *Federal Penal Code* (18 U.S.C. 76) (Tr. 3-5). The first count charges the defendant with intent to defraud certain persons by falsely assuming to be an officer and employee of the United States by showing a false search warrant and badge bearing the letters "U. S." Count two, on the other hand, charges the defendant, on the same date, with unlawfully demanding and obtaining from one Lawrence Davis a valuable thing, to-wit: merchandise consisting of twenty gallons of intoxicating liquor.

It has been many times held that Section 32 *Federal Penal Code* (Title 18, *U.S.C.A.* 76), defines two offenses: (a) the first being the false impersonation of an officer or employee of the United States and acting to defraud the United States or some person, and (b), falsely impersonating an officer or employee and demanding or obtaining money or valuable thing, with intent to defraud. (*United States v. Rush*, 196 Fed. 579.)

It is held in *Lamar v. United States*, 241 U. S. 102, that when rightfully construed the operation of the first clause of the section is to prohibit and punish the falsely assuming or pretending with intent to defraud the United States or any person, to be an officer or employee of the United States as defined in the clause and the doing in the falsely assumed character any overt act whether it

would have been legally authorized and the assumed capacity existed or not, to carry out the fraudulent intent. This is all that was alleged in the first count of the indictment here in issue, namely, the defendant was charged with attempting to defraud Lawrence and W. H. Davis, as more particularly set forth in the indictment, and in pursuance of such intent he was charged with having committed the overt acts of serving upon Lawrence Davis a purported search warrant and then searching the premises of said Davis, and in addition with having in his possession and showing to the said Lawrence Davis a badge bearing the letters "U.S."

The second crime denounced by Section 32 of the *Federal Penal Code* is the falsely assuming or pretending to be an officer or employee acting under the authority of the United States, and in such pretended character demanding or obtaining any money, paper, document or other valuable thing, at which time the offense is complete. In *United States v. Barrow*, 239 U. S. 74, it is pointed out that the aim of the Section is not merely the protection of innocent persons from actual loss through reliance upon false assumption of federal authority but to maintain the general good repute and dignity of the service itself. It is further pointed out that it is inconsistent with this object, as well as the letter of the statute, to make determinative the question whether one who has parted with his property upon the strength of the fraudulent representation of federal employment has received an adequate quid pro quo in value.

This is what is charged in the second count of the indictment, namely: that the defendant while falsely pre-

tending to Lawrence Davis that he was an officer and employee of the United States, did unlawfully demand and obtain from the said Davis a valuable thing, to-wit: merchandise consisting of twenty gallons of intoxicating liquor.

Therefore, it would appear indisputably that the indictment charges two separate and distinct offenses; and that the face of the record is without error. Therefore, the honorable district court correctly ruled in denying defendant's motion for arrest of judgment hereinbefore referred to.

3. Assuming, but in no way conceding, that the whole transcript of the record including the evidence may be considered in reviewing an order denying a motion in arrest of judgment, the evidence abundantly sustains both counts.

Witness Lawrence Davis testified that he saw the defendant on the date charged in the indictment in the rear of his home; that at that time defendant flashed a badge on him which had the letters "U. S." on the face of it and he showed him a paper and said he was going to search his house. (Tr. 12-13.) This evidence alone we respectfully submit sustains the allegations in count one of the indictment.

The witness W. H. Davis testified that one of the men removed twenty gallons of liquor to a car which was waiting in the alley (Tr. p. 15).

Mr. Bott of the Department of Justice, after proper foundation had been laid showing that the witness W. H. Davis had taken the government by surprise, testified that the said W. H. Davis told him that "after the liquor

was placed in the car in the alley, Mr. Lund told his partner to go into the adjoining room and that then Mr. Lund said to him, 'we don't do things this way, owing to the fact that you have a mother and baby. How much money have you got on you?'" (Tr. p. 16.) The above quoted testimony we submit supports the allegations that the defendant Oscar Lund obtained something of value as charged in the indictment on the date in question, to-wit: twenty gallons of intoxicating liquor.

We respectfully repeat that even assuming that the evidence may be reviewed in considering the correctness of the lower court's order the evidence supports both counts of the indictment.

We turn now to a consideration and examination of appellant's references cited in support of his contention. They were reversed because the courts held in each instance that the various counts upon which separate sentences had been imposed relied on the same evidence, and there was no independent evidence to support the respective counts. It is further observed in connection with appellant's references that not one of them involved the question here argued, to-wit: the ruling of the court below in denying defendant's motion in arrest of judgment.

III.

Conclusion

There is no showing of harmfulness or prejudice to the substantial rights of the appellant. On the contrary, the record demonstrates that the appellant was accorded a

fair trial and that the verdict is just and the sentences imposed on both counts were in accordance with law.

We respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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J. J. IRWIN,
Assistant United States Attorney,
Attorneys for Appellee.